

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

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COMPLAINANT,

**TRI-STATE GENERATION AND
TRANSMISSION ASSOCIATION, INC.,**

PROCEEDING NO. 19F- E

FORMAL COMPLAINT

In support, United Power states:

NATURE OF THE PROCEEDING

1. This Complaint is necessitated by Tri-State Generation and Transmission Association, Inc.'s (Tri-State) ongoing efforts to thwart Complainant's ability to discharge the fiduciary duties it owes to its members by, among other things, fully and completely exploring its power supply options under Colorado Public Utilities Law, by either withdrawing from membership in Tri-State on terms and conditions that are just, reasonable, and nondiscriminatory,¹ or continuing as a Tri-State member under a partial requirements contract that would benefit the environment and United Power's members in a way that is fair and

¹ Articles 1-7 of Title 40, C.R.S. *See* § 40-101, C.R.S.

equitable to Tri-State as well. United Power files this Formal Complaint because Tri-State's actions have prevented United Power from exercising these rights and meaningfully or realistically pursuing either option.

2. To that end, in direct conflict with one of its much-touted pillars of cooperative organization—"voluntary and open" membership—Tri-State has waged a multi-year campaign to deter any member-owner from attempting to exercise a withdrawal right that its Bylaws provide. United Power has sought to work in good faith within the cooperative structure.² Because of Tri-State's conduct, however, United Power has determined it must seek relief from this Commission to enforce Tri-State's obligations under its Bylaws. After having avoided an exit charge hearing before the Commission earlier this year, Tri-State has now determined that, no matter what the Bylaws provide, member-owners will not be permitted to withdraw unless and until Tri-State in its sole discretion decides to allow it. Further, and as a part of its efforts to imprison the remaining member-owners, Tri-State remains engaged in efforts at the Federal Energy Regulatory Commission (FERC) that—according to Tri-State—will allegedly strip this Commission of its jurisdiction over exit charges under the Colorado Public Utilities Law. Still further, Tri-State engaged in additional efforts to thwart United Power's ability to pursue options related to a partial requirements contract by implementing a Moratorium earlier this year that, among other things, purports to indefinitely prevent any Tri-State member-owner from transitioning to a partial requirements contract.

3. As the Commission recently determined in an exit charge complaint proceeding initiated by Tri-State member Delta Montrose Electric Association (DMEA),³ Tri-State members

² See Attachment A, Bylaws of Tri-State Generation and Transmission Association, Inc., As Amended and Restated by the Members on April 3, 2019.

³ See Decision No. C19-0291-I, *Interim Decision Denying Motion to Dismiss Formal Complaint*, Proceeding No. 18F-0866E (mailed April 1, 2019).

like United Power are entitled to a just, reasonable and nondiscriminatory exit charge and to have this Commission determine that charge pursuant to a formal complaint proceeding. By determining a just, reasonable, and nondiscriminatory exit charge, the Commission will allow United Power to make a reasonable and fair determination about where it can best obtain and supply the power needs of its members and, if necessary, exit Tri-State in a way that is fair to all the Tri-State members and does not result in a windfall to any of those members (which would be the result if United Power is required to pay the exit charge Tri-State proposed).

INTRODUCTION

4. United Power was founded in 1938 as a not-for-profit rural electric cooperative providing services to homes and businesses throughout Colorado's northern front range. United Power was a founding member of Tri-State. Its service territory extends from the mountains of Coal Creek and Golden Gate Canyon, along the I-25 corridor and Carbon Valley region, to the farmlands of Brighton, Hudson, and Keenesburg. As of early 2019, United Power served more than 90,000 meters representing more than 250,000 customers.

5. Tri-State, a public utility under Colorado law, is a not-for-profit generation and transmission cooperative corporation headquartered in Westminster, Colorado. Tri-State is organized under Colorado law and provides generation and transmission services to member cooperatives in Colorado, Wyoming, Nebraska, and New Mexico, including the Complainant. Tri-State recently attempted to purportedly place itself under the wholesale rate jurisdiction of FERC. FERC dismissed Tri-State's filings as deficient in October 2019, not yet reaching the merits of arguments raised by the Commission and other parties challenging Tri-State's filings.⁴

⁴ See generally 169 FERC ¶ 61,012.

6. Complainant purchases services from Tri-State pursuant to a Wholesale Electric Service Contract (WESC) that runs through 2050. Tri-State claims the right to supply a minimum of 95 percent of United Power’s electricity under this contract. United Power passes the costs of Tri-State’s services on to its respective member-owners through retail rates.

7. Tri-State emphasizes that its first “core principle” as a cooperative is “voluntary and open membership,”⁵ and says member cooperatives can withdraw from Tri-State. Complainant has requested and received an exit charge from Tri-State, seeking more flexible, clean, and cost-effective power supply options to stabilize and control their member-owners’ retail rates.⁶ United Power and other rural cooperatives have watched as other Colorado utilities take advantage of declining wholesale costs to transition to cheaper, cleaner power sources.⁷

8. In 2016, a New Mexico-based Tri-State member, Kit Carson Electric Cooperative (Kit Carson), withdrew from Tri-State after paying a \$37 million exit charge.⁸ The exit charge to which Tri-State and Kit Carson agreed, together with the surrender of Kit Carson’s patronage capital, represented an approximately 2.5 multiplier on Kit Carson’s yearly power purchases from Tri-State (of approximately \$20 million prior to its withdrawal). Tri-State publicly

⁵ See, e.g., *Powering Potential: 2018 Investor Presentation*, TRI-STATE GENERATION AND TRANSMISSION ASS’N, at 4, <https://www.tristategt.org/files/TriState-AnnualReport-FY2017-040318.pdf>. Tri-State also touts “democratic member control” as one of its core principles. *Id.* Tri-State is governed by its Board of Directors. Each of Tri-State’s member cooperatives elects an individual from its own Board of Directors to serve on the Tri-State Board. These individuals are often referred to as “dual directors” since they serve both on the member Board and the Tri-State Board. Tri-State characterizes this as “democratic” governance, claiming that each member system is represented at Tri-State by its dual director: one system, one vote. The reality, however, is that these dual directors are required to represent Tri-State’s interest when sitting on the Tri-State Board, as Tri-State makes clear in regular fiduciary duty presentations to its Board. If a system’s interests conflict with Tri-State’s interests, then, according to Tri-State, the “dual director” must either vote Tri-State’s interest, or recuse from the vote. The dual director therefore may not represent and vote their home system’s interest in the precise situation when it would be most critical to do so. The notion that these dual directors “represent” their home systems is a common plank in Tri-State’s advocacy platform, but it is a myth.

⁶ United has also provided a draft partial contracts proposal to Tri-State, to which Tri-State has not responded.

⁷ For example, Public Service Company of Colorado’s recent Colorado Energy Plan successfully brought forward over 2,000 MW of renewable and battery storage resources with projected customer savings of more than \$200 million on a present value basis.

⁸ See J.R. Logan, *Kit Carson CEO Reyes Says Tri-State Break Has Two Big Advantages*, TAOS NEWS (June 30, 2016), <https://www.taosnews.com/stories/kit-carson-ceo-reyes-says-tri-state-break-has-two-big-advantages.23584>.

endorsed that exit charge as “fair” and sufficient to “protect[] the interests of all [Tri-State’s remaining] members.”⁹ And in 2019 (effective in 2020), Colorado-based Tri-State member, Delta-Montrose Electric Association (DMEA) and Tri-State agreed to an exit by DMEA—although Tri-State has fought to keep DMEA’s exit price from the public eye.¹⁰

9. Like Kit Carson and DMEA, Complainant seeks an exit charge that—if paid—will satisfy its obligations related to Tri-State’s debts and resources acquired on Complainant’s behalf, while at the same time allowing Complainant to best serve the public good by minimizing its customers’ retail rates and maximizing opportunities to transition towards a clean generation mix. Although United Power remains committed to exploring all of its options—including remaining as a Tri-State member under a partial requirements contract—United Power wants to ensure that the calculation of its respective exit charge is fair to remaining Tri-State member-owners as well as to the member-owners of United Power.

10. Recognizing the critical importance of these goals for its member-owners and lacking confidence in Tri-State’s ability and desire to close the gap between its wholesale rates and those of the broader market, Complainant requested an exit charge from Tri-State in August 2018. In response to this request, Tri-State stated that it could provide United Power with an exit charge, utilizing one specific method of calculation, but stated that the proposed exit charge would only be within 10 percent of the actual exit charge that Tri-State would in fact charge. Tri-

⁹ Press Release, Tri-State Generation and Transmission Ass’n, Inc., *Tri-State and Kit Carson Electric Cooperative Enter Into Membership Withdrawal Agreement*, (June 27, 2016), <https://www.tristategt.org/tri-state-and-kit-carson-electric-cooperative-enter-membership-withdrawal-agreement>.

¹⁰ See, e.g., Robert Walton, *Tri-State Files for FERC Regulation, Delta-Montrose to Exit in 2020*, UTILITY DIVE (July 24, 2019), <https://www.utilitydive.com/news/tri-state-files-for-ferc-regulation-delta-montrose-to-exit-in-2020/559397/> (“a [DMEA] spokesperson told Utility Dive in an email [that] DMEA was ‘willing to release the exit charge,’ but respects ‘Tri-State’s request to keep these figures confidential until the actual time of our withdrawal.’”).

State further stated that in order to provide United Power with a precise exit charge, United Power would have to pay a \$250,000 fee.

11. United Power asked Tri-State to provide it with a reasonable exit charge, but did not elect to pay the \$250,000 fee because it was, at the time (and still is) considering its options as it relates to an exit from Tri-State or a partial requirements contract with Tri-State.

12. Two days after requesting an exit charge, Tri-State responded by providing United Power with a one-page document that calculated a punitively high exit charge, which would result in a massive windfall to Tri-State and its non-withdrawing members. Indeed, that figure represented nearly six times United Power's total power purchases from Tri-State (as of 2017). To put this in perspective, if all but one of the current Tri-State members elected to exit Tri-State at this time and paid a similar exit charge, it would amount to an approximately \$3 billion windfall to the last remaining member (even after satisfying all outstanding debts and obligations).

13. In addition to its request for an exit charge from Tri-State, United Power continued to work to explore other options that would allow it to remain a member-owner of Tri-State while transitioning—at least in part—to cleaner and cheaper sources of power.

14. To that end, in 2018 and 2019, United Power led the effort to amend Tri-State's Bylaws to permit partial requirements contracts. United Power believes that partial requirements contracts are an essential component of any successful plan to de-carbonize Colorado electricity generation consistent with Colorado state policy objectives and lower rates to United Power's customers. In seeking a partial requirements option, United Power understood that Tri-State envisioned using partial requirements contracts to allow its member-owners to pursue more local renewable energy projects that would, in turn, help Tri-State meet Colorado's clean power goals.

15. At a presentation to Mountain Parks Electric on January 3, 2019, United Power's New Business Director Jerry Marizza explained that "the proposal for a partial requirements contract option would assure that Tri-State continues to provide a portion of United Power's energy purchases, while allowing United Power to meet its electricity load growth by pursuing its own local renewable energy projects, or buying wholesale power from other providers."¹¹

16. On February 14, 2019, Tri-State proposed amending its Bylaws, ostensibly to "provide for the possibility of creating additional classes of membership in Tri-State" and allow for contracts that varied from the types of contracts it currently has with member-owners.

17. In its February 14, 2019 Memorandum, Tri-State made no mention or reference as to how or whether the proposed amendments would affect Tri-State's ability to become FERC rate regulated, or whether FERC jurisdiction played any role in Tri-State's proposal to amend the Bylaws.

18. On March 4, 2019, as part of its efforts to persuade its member-owners to approve a modification to the Bylaws allowing new classes of membership, Tri-State identified a desire to allow members to enter partial requirements contracts:

The purpose of the proposed changes is to provide for the possibility of creating additional classes of membership in Tri-State. ...

Some Members have asked the Board to consider partial-requirements contracts or subscription contracts. The Contract Committees have considered alternatives to the all-requirements contracts and so far have not recommended any changes. The Board has also not adopted any changes.¹²

¹¹ Clean Cooperative, 1/17/19, by Joe Smyth (<https://www.cleancooperative.com/news/United-power-says-tri-state-policies-are-turning-away-large-customers>).

¹² Attachment B, Proposed Bylaw Changes, Questions and Answers.

19. In addition to advising that the “bylaw changes would permit the Board the flexibility to consider and establish additional classes of membership that benefit existing Members,” Tri-State specifically represented that the Bylaw changes would not “make Tri-State subject to FERC jurisdiction”; and that although the changes “would provide the Board the flexibility to seek FERC jurisdiction if the Board determined that was in the best interest of the existing Members ... **The Board has no current intention to seek FERC jurisdiction.**” (Feb. 14, 2019 Memorandum Regarding Proposed Bylaw Amendments, at 1 (emphasis added).)

20. This representation is not credible and is contrary to other Tri-State representations that it had been studying becoming FERC rate regulated ever since Tri-State’s then-CEO Mike McInnes “directed [management] to start it up again.”

21. Thus, unbeknownst to Tri-State’s members, including but not limited to United Power, Tri-State management apparently had been studying and considering FERC jurisdiction as a “significant option” at the same time it was telling its members it had “no current intention” to do so. Tri-State had been secretly creating for months a framework to attempt to move to FERC, by inducing United Power and its other member-owners to support changes to Tri-State’s Bylaws, without disclosing its intent to use those changes for the purpose of attempting to subject Tri-State to general FERC jurisdiction and strip the Commission of jurisdiction over exit charges.

22. In the weeks and months preceding Tri-State’s representation to its member-owners that it had “no current intention” to seek FERC jurisdiction, United Power believes, and therefore alleges, that there were dozens or perhaps hundreds of communications about that very possibility. As of December 2018, Tri-State had already been consulting with its attorneys about becoming FERC regulated for more than six months. And at the Commission’s emergency pre-

hearing conference on July 12, 2019 in the *DMEA* proceeding, Tri-State admitted that it had begun drafting the tariffs to be filed with FERC well before January 2019.

23. The Bylaw change was adopted by the Tri-State member-owners at the April 3, 2019 annual meeting, by a vote of 42-1:

At the April 3 annual meeting, delegates of our member systems approved a change of the association's bylaws that allows the board to create additional classes of membership and contracts for our members as well as those entities interested in power and services from Tri-State ...

"The bylaw amendment could provide current and future members more flexibility, while still meeting their contractual obligations to the other members," said Chairman Gordon. "Additional classes of membership could provide for partial-requirements contracts, municipal memberships or memberships from other utilities."

A contract committee of the membership will convene in the coming months to begin reviewing the wholesale contract, options for alternative membership and contract structures, and the committee will ultimately make recommendations to the board of directors.¹³

24. The new Bylaw provision states, in relevant part, as follows:

Section 2: Additional Membership Classes. Notwithstanding any other provision of these Bylaws to the contrary, the Board of Directors may establish one or more classes of membership in addition to the existing all-requirements class of membership. Such additional membership classes may include, without limitation, one or more partial requirements membership classes whereby a member who chooses to be a member of that class shall assume responsibility for meeting a portion of its load requirements. Members may choose their class of membership subject to any terms and conditions of membership and rights and preferences and limitations on the rights and preferences of the members of each additional class of membership as the Board of Directors establishes from time to time. ...

¹³ Attachment C, Tri-State Press Release, 4/5/19 (<https://www.tristategt.org/tri-state-highlights-strong-financial-and-operational-performance-67th-annual-meeting>).

25. On June 3-4, 2019, Tri-State staff first revealed its FERC plans in Strategic Planning sessions with Tri-State's Board. Staff indicated at that time, contrary to what the member-owners had been told just two months earlier, that it intended to recommend that the Board vote in July to pursue FERC regulation by adding a non-cooperative member. On June 13, 2019, Ken Reif and Duane Highley made a similar presentation to Tri-State's member-owners, including United Power.

26. Tri-State Members United Power, DMEA, and LPEA, emailed a letter on June 14, 2019 to all Tri-State cooperative managers expressing their concern that "Tri-State has provided an inadequate amount of information about the validity, process, and impacts of pursuing general FERC oversight," and encouraging them to sign on to a letter "asking that Tri-State management provide answers to these critical questions before pressuring the board toward making a drastic change."

27. On June 27, 2019, United Power reiterated its concerns in a letter to Tri-State's CEO: "I believe the membership needs more than 3 weeks to be able to perform their due diligence on such an important decision ... There are still questions to be answered about how this proposed change could affect costs for [Tri-State] and the member systems, contractual terms and conditions, existing court and Public Service/Utility Commission proceedings, Rating Agency opinions, and overall governance."¹⁴ United Power specifically requested that Tri-State "slow down the process to allow the Contract Committee to finish their work and to allow us and the membership the ability to complete our due diligence ..."¹⁵

¹⁴ Attachment D, United Power's June 27, 2019 Letter.

¹⁵ *Id.*

28. Notwithstanding these requests, and a similar request from Colorado’s legislative leaders, on July 9, 2019, Tri-State’s Board of Directors voted to seek FERC regulation by adding a non-cooperative member.¹⁶ Tri-State made tariff application filings on July 23 with the FERC.

29. Tri-State announced its Responsible Energy Plan on July 17. The July 17, 2019 press release explained that Tri-State was considering partial requirements contracts as part of the plan:

Tri-State’s membership is currently considering greater contract flexibility for members, including partial requirements contracts that would allow for more local renewable energy projects.

As a cooperative, Tri-State’s members govern the terms of the cooperative’s wholesale power contracts through the board of directors. A contract committee of the membership, including representatives from each member system, are developing recommendations to the board.

“Our members are developing recommendations to make their wholesale power contracts more flexible,” said Gordon. “With partial requirements contracts, members could increase local renewables while also maintaining the value and security of being a member of Tri-State.”¹⁷

30. On September 3, 2019, Tri-State announced the addition of MIECO, a subsidiary of Marubeni Corporation, as the first non-utility and non-cooperative member. MIECO supplies natural gas to purchasers throughout the U.S., including Tri-State for its power plants across its multi-state region. Tri-State then claimed that the addition of MIECO allowed it to become “rate jurisdictional to the Federal Energy Regulatory Commission.”¹⁸ Tri-State thus used the Bylaw amendment to facilitate its efforts to become FERC rate regulated and to attempt to deprive the

¹⁶ Attachment E, Letter from Colorado Legislative Leaders filed as a public comment in Proceeding 18F-0866E.

¹⁷ Attachment, Tri-State’s July 17, 2019 Press Release (<https://www.tristategt.org/tri-state-announces-transformative-responsible-energy-plan>).

¹⁸ Attachment, Tri-State September 3, 2019 Press Release (<https://www.tristategt.org/tri-state-adds-mieco-new-cooperative-member>).

Commission of jurisdiction over exit charges that Tri-State demands of Colorado member-owners who seek to withdraw from membership.

31. *The very next day*, having achieved its purpose of adding a new non-cooperative member in order to claim FERC jurisdiction, Tri-State immediately suspended the process for withdrawing from Tri-State as well as the process for approving partial requirements contracts. On September 4, 2019, Tri-State's Board of Directors adopted a resolution (Board Moratorium) implementing an indefinite moratorium to prevent any Tri-State member-owner from withdrawing from membership or transitioning to a partial requirements contract.¹⁹ This action was in direct contravention of the Tri-State membership as expressed by the 42-1 vote on the changes to the Bylaws at the April 3, 2019 annual meeting.

32. The Board Moratorium notes that Tri-State previously had provided both Kit Carson and DMEA with "initial estimates of amounts that the Member System would be required to pay to meet its contractual obligations to Tri-State," as well as "Shopping Letters" that "authorized the Member System to investigate the cost of obtaining an alternative supply of power in the event that it withdrew from Tri-State."²⁰ The Moratorium also abandons Tri-State's practice of referring to member-owners' "exit charges," and now refers to them as "Make-Whole Numbers."²¹

33. Unlike its approach to adding a new member and claiming FERC jurisdiction, Tri-State now claims the Contract Committee needs time, and the advice of another consultant, to study alternative classes of contracts and the calculation of member-owner exit charges. What Tri-State appears to have planned is to try yet again to develop a justification for imposing

¹⁹ Attachment H, Tri-State Board Resolution of September 4-5, 2019.

²⁰ *Id.*

²¹ *Id.*

punitive “exit charges,” including for transitioning to partial requirements contracts, that helps Tri-State imprison its member-owners, to the detriment of Colorado’s environment and its ratepayers.

34. Tri-State’s “Board Moratorium” functions as an unjust, unreasonable, and discriminatory exit charge that prevents United Power from exercising the withdrawal rights guaranteed by the Bylaws. United Power has no recourse, except to this Commission, to establish a just, reasonable and nondiscriminatory exit charge. To be sure, past member experiences suggest that Tri-State’s internal withdrawal process would not have produced a fair and non-discriminatory exit charge for Complainant, but Tri-State has now eliminated that possibility altogether.

35. Further, prior to the Moratorium, on August 2, 2019 United Power delivered to Tri-State a Notice of Intent to become a partial requirements contract member. United Power also asked for and received a Shopping Letter.

36. On September 12, 2019, United Power delivered to Tri-State a draft partial requirements contract proposal and a standstill agreement (whereby United Power asked Tri-State to agree not to enter into any new power supply agreements to which United Power would be subject).

37. On October 22, 2019, United Power delivered to Tri-State United Power’s analysis of the impact on Tri-State’s revenue and costs of United Power’s partial requirements contract proposal.

38. To date, Tri-State has not responded to United Power’s partial requirements contract proposal, even though Tri-State agreed to respond by November 2, 2019.

39. At the same time, Tri-State continues to pursue its efforts to subject itself to FERC rate regulation, which Tri-State claims will strip this Commission of its jurisdiction under the Colorado Public Utilities Law to establish just, reasonable and nondiscriminatory exit charges for Tri-State members.

40. Like Kit Carson and DMEA, Complainant seeks to determine a just, reasonable, and nondiscriminatory exit charge from Tri-State. But Tri-State's refusal to engage in a meaningful process to adjust United Power's charge, reflects discriminatory, abusive, and unjust and unreasonable treatment against Complainant that the Colorado Public Utilities Law exists to remedy.

41. United Power seeks a just, reasonable and nondiscriminatory exit charge that is fair both to United Power's member-owners and to Tri-State's remaining members.

42. Tri-State's "core principle" of "voluntary and open membership," reflected in the withdrawal provisions of the Tri-State Bylaws, is hollow if Tri-State can unilaterally set an exit charge that is unjust, unreasonable, and discriminatory, and thereby prevent a member from withdrawing. It is even more egregious if Tri-State can refuse to provide an exit charge at all, and unilaterally declare a "moratorium" on any further withdrawal efforts. In essence, Tri-State's position amounts to claiming it has the right to deprive rural Coloradans of less-expensive, cleaner generation resources—denying them opportunities for local growth and economic development that come with that lower-cost energy supply.

43. Complainant accordingly requests that the Commission: (1) exercise its jurisdiction over Tri-State as a public utility subject to Colorado's Public Utilities Law; (2) investigate Tri-State's prescribed exit charge to United Power and declare it contrary to

Colorado law as unjust, unreasonable, and discriminatory; and (3) exercise its authority to establish an exit charge for Complainant that is just, reasonable, and nondiscriminatory.

JURISDICTION

I. General Jurisdictional Background

44. The Commission has jurisdiction to act on the allegations and claims in this Complaint under Article XXV of the Constitution of the State of Colorado, and under Colorado's Public Utilities Laws.²²

45. Complainant is a public utility pursuant to § 40-1-103(2)(a), C.R.S., and has opted through a vote of its member-owners to exempt itself from Commission regulation under the Public Utilities Law.²³ Accordingly, Complainant is regulated under § 40-9.5-101, C.R.S., *et seq.* Complainant is governed by an elected Board of Directors and must provide its member-owners with electric service inside its certificated service territory.

46. Like the Complainant, Tri-State is also a public utility under Colorado law because it is a “cooperative electric association, or nonprofit electric corporation or association” which the law declares “to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of [Title 40].”²⁴ Unlike Complainant, however, Tri-State as a “nonprofit generation and transmission electric corporation[] or association[]” cannot exempt itself from public utility regulation under the Public Utilities Law.²⁵

²² Article XXV states that “[i]n addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges” of a public utility “is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate. Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado.”

²³ See §§ 40-9.5-103 and -104, C.R.S. (allowing distribution cooperatives like United Power to elect exemption from the Public Utilities Law).

²⁴ § 40-1-103(2)(a), C.R.S.; *W. Colo. Power Co. v. Pub. Utils. Comm'n*, 411 P.2d 785, 794-96 (Colo. 1966).

²⁵ § 40-9.5-102, C.R.S.; *id.* § 40-9.5-103.

47. Colorado’s Public Utilities Law gives the Commission broad jurisdiction over public utilities like Tri-State. The Commission has the power, authority, and duty “to govern and regulate all rates, charges, and tariffs of every public utility” (except those like Complainant who have exempted themselves), to “correct abuses” by public utilities, to “prevent unjust discriminations ... in the rates, charges, and tariffs of such public utilities,” to “generally supervise and regulate every public utility in this state,” and “to do all things” that are “necessary or convenient in the exercise of such powers.”²⁶

48. The Public Utilities Law also provides that, except as expressly authorized by statute, a regulated public utility “shall not make or grant any preference or advantage” or “establish or maintain any unreasonable difference as to rates [or] charges”²⁷ And it gives the Commission expansive authority to prescribe remedies in complaint proceedings such as this. Specifically, Section 40-3-111(1), C.R.S., provides:

Whenever the commission [...] upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, [...] or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, [...] the Commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order. In making this determination, the Commission may consider [...] any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.²⁸

49. Similarly, § 40-3-111(2)(a), C.R.S. establishes that “[t]he commission has the power ... upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule,

²⁶ § 40-3-102, C.R.S.

²⁷ § 40-3-106(1)(a), C.R.S.

²⁸ § 40-3-111(1), C.R.S.

contract, or practice, or the entire schedule of rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices of any public utility; and to establish new rates, fares, tolls, rentals, charges, classifications, rules, contracts, practices, or schedules, in lieu thereof.”²⁹

50. Colorado’s Public Utilities Law facially applies to Tri-State as a nonprofit generation and transmission cooperative corporation and prevents it from “establish[ing], charge[ing], or collect[ing] a discriminatory or preferential rate, charge, rule, or regulation” in violation of § 40-3-106(1), C.R.S. or § 40-3-111, C.R.S.³⁰

II. The Commission’s Previous Exercise of Jurisdiction over Tri-State in Proceeding No. 18F-0866E

51. In Proceeding No. 18F-0866E, the Commission presented its most recent—and most forceful—articulation of precisely why it possesses authority over the exact issues brought forward by Complainant.

52. Specifically, in Decision No. C19-0297-I,³¹ the Commission explicitly rejected numerous Tri-State theories contending that the Commission lacks jurisdiction to establish “exit charges.”³² The Commission determined in that Decision that: (1) it possesses subject matter jurisdiction over the setting of exit charges; (2) that setting of an exit charge falls within the Commission’s complaint authority; (3) Tri-State’s constitutional attempts to end-run Commission jurisdiction are inadequate; (4) Colorado statutes do not divest the Commission of jurisdiction to hear exit charge-related complaints; and (5) discriminatory exit charges such as those Tri-State has historically attempted to set constitute cognizable discrimination claims under Colorado law.³³

²⁹ § 40-3-111(2)(a), C.R.S.

³⁰ § 40-6-111(4)(a), C.R.S.

³¹ Proceeding No. 18F-0866E, Decision No. C19-0297-I (mailed Apr. 1, 2019).

³² *Id.* at 2 ¶ 5.

³³ *See generally id.* at 4 ¶ 9–20 ¶ 40.

GENERAL ALLEGATIONS

I. Past Withdrawals from Tri-State

53. The equitable member withdrawal provision in Article I, Section 3 of Tri-State's Bylaws reflects Tri-State's "core principle" of "voluntary and open membership."

54. Consistent with this "core principle," DMEA and Kit Carson both sought to exit the Tri-State system—efforts given effect in 2020 and 2016, respectively. In the latter case, after having initially demanded \$137 million as an exit charge (or nearly seven times the amount of Kit Carson's annual power purchases from Tri-State),³⁴ Tri-State calculated a final \$37 million exit charge³⁵ for Kit Carson's withdrawal. Neither the initial DMEA exit charge prescribed by Tri-State, nor the ultimate exit charge agreed upon by the parties to settle DMEA's formal complaint, are public.

55. Tri-State embraced the \$37 million Kit Carson exit charge as just, reasonable, and nondiscriminatory for Kit Carson and for Tri-State's other member cooperatives. Tri-State publicly described it as "fair and equitable," and sufficient to "protect the interests of all [Tri-State's remaining] members." Tri-State's board has also approved the terms and exit charge for DMEA's withdrawal.

³⁴ See J.R. Logan, Kit Carson Electric Cooperative is officially seeking another power supplier after being told it would cost \$137 million to get out of its existing contract (Jan. 14, 2015) <https://www.taosnews.com/stories/taos-electric-co-op-says-tri-state-offer-insulting.34357>. With respect to the initial \$137 million exit charge, Kit Carson's CEO stated that "Tri-State calculated its exit formula by multiplying the annual revenue it collects from Kit Carson and multiplying it by the number of years remaining in the contract, then subtracting Tri-State's costs." (*See id.*)

³⁵ This \$37 million net cash consisted of \$49.5 million as an early termination fee for withdrawing from membership offset by \$12.5 million for the retirement of Kit Carson's patronage capital. *See Quarterly Report*, TRI-STATE GENERATION AND TRANSMISSION ASS'N, INC., at 8 (Nov. 4, 2016), <https://www.tristategt.org/sites/tristate/files/PDF/2016%20SEC%20filings/10Q-093016.pdf>. Tri-State's summary of the exit can be found in its 2016 10-K filed with the SEC. *Annual Report (Form 10-K)*, TRI-STATE GENERATION AND TRANSMISSION ASS'N, INC., at 39, 64 (Mar. 10, 2017), available at <https://www.tristategt.org/sites/tristate/files/PDF/2016%20SEC%20filings/10K-EOY-123116.pdf>.

II. Tri-State is Obligated Under Colorado Law to Provide Member Cooperatives—Including the Complainant—With Just, Reasonable, and Nondiscriminatory Exit Charges

56. Tri-State appears to continue to believe, based on its conduct, that it can set exit charges—or even *decline to set exit charges*—in any fashion it wishes and without any obligation under Colorado law to provide exit charges that are just, reasonable, and nondiscriminatory.

57. Tri-State’s position—setting a discriminatorily high exit charge for United Power—*de facto* amounts to asserting Complainant has no right to withdraw from Tri-State and that any withdrawal is entirely within the discretion of the Board. This conduct violates Colorado law; Tri-State may not arbitrarily let some of its member cooperatives exit while holding others captive through unjust, unreasonable, and discriminatory exit charges.

III. Complainant’s Request to the Commission

58. Because Tri-State is a public utility subject to Colorado’s Public Utilities Law, the Commission should exercise its jurisdiction to decide the lawfulness of: (1) Tri-State’s position that it can impose an unjust, unreasonable, and discriminatory exit charge on United Power; and (2) Tri-State’s prescribed exit charge to United Power.

59. If the Commission determines Tri-State’s conduct is unlawful, Complainant requests the Commission, consistent with its statutory authority and mandate, adjudicate a just, reasonable, and nondiscriminatory exit charge for United Power. Such a request does not require the Commission to construe the Tri-State WESC, Tri-State’s Bylaws, or any other Tri-State contract with Complainant. Nor does it require changing any rate Tri-State currently charges its members.

60. Complainant is contemporaneously filing a motion asking the Commission to hear this Complaint *en banc*, and to establish a procedural schedule commencing in December 2019.

This will allow Complainant to put forward expert testimony for a just, reasonable, and nondiscriminatory exit charge for Commission adjudication.

61. Complainant respectfully requests that the Commission fulfill its primary mandate of protecting public utility customers by: (1) exercising jurisdiction over Tri-State as a public utility subject to Colorado's Public Utilities Law; (2) investigating Tri-State's behavior around exit charges and declaring it unjust, unreasonable, and discriminatory; and (3) exercising its statutory authority to establish an exit charge for United Power that is just, reasonable, and nondiscriminatory.

FIRST CLAIM:
TRI-STATE'S FAILURE TO PROVIDE A
JUST AND REASONABLE EXIT CHARGE FOR UNITED POWER

62. Complainant incorporates the allegations in the paragraphs above.

63. Section 40-3-101, C.R.S., § 40-3-102, C.R.S., § 40-3-111(1), C.R.S., and § 40-3-111(2)(a), C.R.S. are each applicable to Tri-State as a public utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision giving Tri-State an exemption from these statutes.

64. Tri-State's prescribed United Power exit charge is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

65. Tri-State's exit charge for United Power is not just and reasonable.

66. Because the exit charge is not just and reasonable, the Commission has the authority and duty under Colorado's Public Utilities Law to determine an exit charge for United Power that is just and reasonable.³⁶

³⁶ See § 40-3-111(1), C.R.S. ("Whenever the commission, upon [...] complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, [...] or that the rules, regulations, practices, or contracts

67. United Power has standing to bring this claim based upon, without limitation, § 40-6-108(1)(a), C.R.S., as United Power is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

68. United Power has standing to bring this claim based upon, without limitation, § 40-6-108(1)(b), C.R.S., as United Power represents more than 25 end-use customers of Tri-State.

69. United Power has standing to bring this claim based upon, without limitation, § 40-6-111(4)(a), C.R.S., as United Power is either a member of Tri-State, a retail customer of an electric cooperative that is served by Tri-State, or a public utility.

SECOND CLAIM:
TRI-STATE'S FAILURE TO PROVIDE A
NONDISCRIMINATORY EXIT CHARGE FOR UNITED POWER

70. Complainant incorporates the allegations in the paragraphs above.

71. Section 40-3-106(1), C.R.S. and § 40-6-111(4)(a), C.R.S. prohibit public utilities, including nonprofit generation and transmission corporations like Tri-State, from charging rates or establishing charges that are preferential or discriminatory.

72. Section 40-3-102, C.R.S., § 40-3-106(1)(a), C.R.S., § 40-3-111(1), C.R.S., § 40-3-111(2)(a), C.R.S., and § 40-6-111(4)(a), C.R.S., are each applicable to Tri-State as a public utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision giving Tri-State an exemption from these statutes.

affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, [...] the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order. In making such determination, the commission may consider [...] any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development”).

73. Tri-State's proposed exit charge to United Power is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

74. Tri-State refuses to explain how a \$37 million exit charge for Kit Carson was "fair and equitable" while demanding United Power pay an exit charge that is dramatically and disproportionately higher and that would result in a massive windfall to Tri-State and its non-withdrawing members.

75. Tri-State's exit charges for Kit Carson and United Power represent an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect.

76. Because Tri-State's exit charges for Kit Carson and United Power demonstrate an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect, the Commission has the authority and duty to determine an exit charge for United Power that is not discriminatory pursuant to the Public Utilities Law.³⁷

77. United Power has standing to bring this claim based upon, without limitation, § 40-6-108(1)(a), C.R.S., as United Power is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

78. United Power has standing to bring this claim based upon, without limitation, § 40-6-108(1)(b), C.R.S., as United Power represents more than 25 end-use customers of Tri-State.

³⁷ See *supra* note 22.

79. United Power has standing to bring this claim based upon, without limitation, § 40-6-111(4)(a), C.R.S., as United Power is either a member of Tri-State, a retail customer of an electric cooperative that is served by Tri-State, or a public utility.

SERVICE OF DOCUMENTS

Complainant requests that all testimony, discovery, pleadings, and other documents in this proceeding be served on the following:

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Joel S. Neckers, #40886
Marissa S. Ronk, #49181
Wheeler Trigg O'Donnell LLP
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RELIEF REQUESTED

Complainant requests that the Commission provide the following relief:

- (i) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that the United Power exit charge prescribed by Tri-State is unjust and unreasonable;
- (ii) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that the United Power exit charge prescribed by Tri-State is discriminatory;
- (iii) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., establishing an exit charge for Complainant that is just, reasonable, and nondiscriminatory; and
- (iv) Award Complainant such additional or other relief as the Commission deems proper.

Respectfully submitted this 6th day of November, 2019

/s/ Joel S. Neckers

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ATTORNEYS FOR UNITED POWER, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2019, I served the foregoing **FORMAL COMPLAINT** on the parties by e-mailing the same to the following:

Name	Email Address	Entity
Doug Dean	Doug.dean@state.co.us	Colorado Public Utilities Commission
Kenneth V. Reif	kreif@tristategt.org	Tri-State Generation and Transmission Association, Inc.
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/s/Joel S. Neckers